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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 589.

WILLIAM JACOB,

Petitioner,

against

THE CITY OF NEW YORK,

Respondent.

REPLY BRIEF OF PETITIONER.

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Statement.

The statement of facts is fully stated in petitioner's brief heretofore filed herein. This reply is made in response to respondent's brief and the argument therein presented.

Argument.

The cases cited by respondent do not apply to the questions involved herein.

The petitioner's suit is in personam, against the employer, under the Jones Act, "the new rule", Pacific v. Peterson, 278 U. S. 130, 139. The following cases cited by

the respondent concern suits in rem, against the vessel, in which the old maritime rules alone could be applied, and are therefore inapplicable here:

Birkenhead, The, 51 F. (2d) 116 (pp. 12, 16 and 17, respondent's brief);
Cricket, The, 71 F. (2d) 61 (p. 23, respondent's brief);
Plamals v. Pinar Del Rio, 277 U. S. 151 (p. 17, respondent's brief);
Tawmie, The, 80 F. (2d) 792 (p. 23, respondent's brief).

In Plamals v. Pinar Del Rio (supra), it was decided by this Court that the Jones Act, though creating a cause of action for personal injuries, did not create a lien for enforcing it, in rem. All of the above cases cited by respondent follow the Plamals case.

The case of Kilday v. Jahncke Dry Dock & Ship Repair Company, 281 Fed. 133 (pp. 16 and 17, respondent's brief), is likewise not applicable. The employee there charged that there was a failure to test the tool, but Jacob has not so contended, but has proved it was worn out (R. 12) and that there was a failure to supply a proper one (R. 14 and 23), as required by the statute. Jones Act and Railway Servants' Act (infra).

The case of Marsh v. Chickering, 101 N. Y. 396 (pp. 12, 15 and 23, respondent's brief) was decided in 1886, many years before the enactment of either the Jones Act or Railway Servants' Act, and concerned a tort under the old common law, wherein contributory negligence and assumption of risk were complete defenses. These rules were abolished by statute in cases of seamen. The Jones Act, Section 33, Title 46, U. S. C. A., which incorporated by reference Section 51, Title 45, U. S. C. A. Its (Jones Act) purpose is clearly stated by this Court in Arizona v. Anelich, 298 U. S. 110, at page 123 thus:

"Like considerations, and others to be mentioned, require a like conclusion with respect to the modified and in some respects *enlarged liability* imported into the maritime law by the Jones Act. The legislation was *remedial*, for the *benefit and protection of seamen* who are peculiarly the wards of admiralty. Its *purpose was to enlarge that protection, not to narrow it.* Cf. Chelentis v. Luckenbach S. S. Co., supra. Its provisions, like others of the Merchant Marine Act, of which it is a part, are to be liberally construed to attain that end (citing cases)." (Italics ours.)

O'Brien v. Missouri, Kansas & Texas Ry. Co., 36 Tex. Civ. App. 528, 82 S. W. 319 (p. 13, respondent's brief), was decided in 1904, four years before the Railway Servants' Act and is clearly not applicable, it not having been a suit under the statute in question.

Garnett v. Phoenix Bridge Company, 98 Fed. 192 (p. 13, respondent's brief), also relied on by respondent, was decided in 1899, 9 years before the enactment of the Railway Servants' Act and 21 years prior to the Jones Act.

The case of Allen Gravel Company v. Yarbrough, 133 Miss. 652, 98 So. 117 (pp. 16 and 21, respondent's brief), concerned a tort under state laws and was not a seaman's action under the Jones Act. It, likewise, is not applicable to the case at bar.

Hedicke v. Highland Springs Company, 185 Minn. 79, 239 N. W. 896 (1931) (pp. 19 and 21, respondent's brief), did not involve a seaman's or railway servant's action. The suit was governed by the common law of Minnesota, not the federal statutes involved herein.

It is apparent that respondent's argument being based upon cases not applicable that its reasoning is untenable.

In view of respondent's Point I, by which it urges that petitioner was required to prove negligence on the part of the shipowner, we wish to point out that petitioner does not argue that he was not required to make prima facie

proof of negligence, but maintains that a cause of action was proven by him under the Jones Act for respondent's negligence. Having so proven his claim, he was entitled to have the jury determine the issues; and the Courts below were in error in applying an old common law doctrine followed by the Courts of the several states, only in cases where contributory negligence and assumption of risk are applicable as matters of defenses, but Congress abrogated these defenses in seamen's cases, save, only to affect the amount of recovery, if there be contributory negligence. Moreover, the question of the rule itself, even in the cases relied upon by respondent has to do with a duty "to inspect", "duty of inspection" (respondent's brief, p. 15), "inspection" (p. 16), "ascertaining defects" (p. 17), "to discover defects", etc. (p. 19), "to inspect" (p. 20); whereas here the worn out condition of the tool had been reported (R. 14). Respondent either misinterprets, or seeks to misapply them, to establish a doctrine (as expressly contended for, p. 18, respondent's brief) that, *where ascertained and reported*, it is "primarily the *employee's* duty to *remedy the defect*". Such a proposition is not supported by any authority and is manifestly wrong. It would require the seaman instead of the shipowner to supply "appliances, machinery, * * * or other equipment" (Statute, Sec. 51, petitioner's brief, pp. 19-20), directly contrary to the act.

Respectfully submitted,

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